IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-1080

Polk County No. EQCE077220

City of Des Moines
Plaintiff-Appellee

vs.

Mark Ogden
Defendant-Appellant

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE ROBERT B. HANSON, DISTRICT COURT JUDGE

BRIEF FOR APPELLANT

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ROUTING STATEMENT

The Appellant believes the Supreme Court should retain this case under Iowa R. App. P. 6.1101(2), because this is a case "presenting substantial issues of first impression," "presenting fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the supreme court," and "presenting substantial questions of enumerating or changing legal principles."

STATEMENT OF THE CASE

This case was commenced by the filing of an Amended Petition in Equity (the "Petition") on October 9, 2014, by the Plaintiff City of Des Moines (the "City"). [App. 1] The subject of the action is a mobile home park, known as the Oak Hill Mobile Home Park, located at 3140 Indianola Road in the City of Des Moines (the "Mobile Home Park"). [App. 1] The land in the Mobile Home Park is owned by Mark Ogden ("Ogden"). [App. 1, 5, 222; App. Supp. 291] The individual mobile homes in the Park are owned by the residents. [App. 222-223]

In its Petition, the City contended that the Mobile Home Park is an illegal use, because it does not conform to current zoning district regulations. [App. 2-3] In paragraph 10 of its Amended Petition, the City sought an injunction requiring that "[t]he use of mobile or manufactured homes as

dwellings on the Real Estate must be stopped and the mobile or manufactured homes must be removed from the Real Estate." [App. 2] Ogden filed an Answer and Affirmative Defenses. [App. 10] Ogden plead three affirmative defenses, as follows:

1. Plaintiff fails to state a cause of action on which relief may be granted.
2. **Legal Non-Conforming Use.** The Defendant's property has been properly operating as it is today from 1941 to present. The restrictions referenced in the Plaintiff's Petition and in the August 5, 2014 letter attached thereto are regulations imposed by the Plaintiff after the date the property was already lawfully used and therefore these regulations do not apply to the Defendant's use of the property at 3140 Indianola Road in the City of Des Moines, Iowa.
3. **Laches/Estoppel/Waiver.** The uses that have been allowed on the Defendant's property have been in place for over seventy (70) years. There are no ordinances or restrictions imposed by the Plaintiff, the City of Des Moines, that apply to the Defendant's property. The Plaintiff, City of Des Moines' failure to take action to notify Defendant of zoning violations

for nearly seventy (70) years constitutes waiver, laches and estoppel.

[App. 11-12]

The action was tried to the Court on March 24, 2016. The Plaintiff City was represented by Luke DeSmet, Assistant City Attorney. The Defendant Ogden was represented by his attorney James E. Nervig. At trial, four witnesses testified and numerous exhibits were admitted into evidence. On May 31, 2016, the Court filed its Findings of Fact, Conclusions of Law, and Ruling (the "Ruling"), in which the Court enjoined the Mobile Home Park from operation because of violation of City ordinances and ordered that such operation must cease within 180 days of the Ruling. [App. 269-283] Ogden filed Notice of Appeal on June 22, 2016. [App. 285-286]

STATEMENT OF THE FACTS

The subject residential Mobile Home Park, known as the Oak Hill Mobile Home Park, is located at 3140 Indianola Road in the City of Des Moines. [App. 1] The Mobile Home Park land is owned by Mark Ogden. [App. 1, 5, 222; App. Supp. 291] There are 30 mobile homes in the Park. [App. 216-218] The individual mobile homes in the Park are owned by the residents. [App. 222-223] These mobile home owners have leases with Ogden authorizing them to reside in their mobile homes within the Mobile

Home Park. [App. 222-223] The mobile home owners and residents have not been named as party Defendants by the City in this action.

City Neighborhood Inspection Zoning Administrator SuAnn Donovan testified. Her testimony is set forth on pages 14 through 90 of the Transcript. [App. 127-203] She identified the City's Exhibit 1 as a March 9, 2016 printout of the four-page online information listing on the website of the Polk County Assessor regarding the mobile home park. [App. 132; App. Supp. 287] On page 2 of the Assessor's information listing, in Commercial Section reference is made to "Mobile Home Park" and "Year Built 1939." [App. Supp. 288] On page 3, in the Detached Structures section reference is made to "Mobile Home Pad" "Year Built 1939" "Quantity 39." [App. Supp. 289]

During cross-examination, Ms. Donovan was asked if she agreed with the Assessor's information that the mobile home park was constructed with 39 mobile home pads in 1939. [App. 184] She testified that she questioned the reliability of the Assessor's information, although she had no personal recollection of the time when the mobile home park was constructed or how many mobile home pads were part of the original construction. [App. 184]

Ms. Donovan testified that she consulted a certain "RL Polk directory" that was published in January of 1955. [App. 179-180] The City did not offer into evidence a written copy of the "RL Polk directory." Ms. Donovan testified that she understood the "RL Polk directory" to provide information that an auto court was on the site from 1939 or 1940 and up to 1955 and that a mobile home park was on the site in 1955. [App. 185] Ms. Donovan gave different testimony in which she stated that she believed the use of the premises as the "Oak Hill Tourist Camp" began in 1941 [App. 139] Ms. Donovan did not testify that the "RL Polk directory" contained any information that would refute the Assessor's website information that there were 39 mobile home pads on the site at the time of original construction.

Ms. Donovan testified regarding the City's Exhibit 8, City Zoning Ordinance No. 5453, adopted by the City Council on July 9, 1953. [App. 72, 143-144] Ms. Donovan testified that the Ordinance provided for a number of setback requirements for mobile homes in trailer parks. [App. 72, 144] The Ordinance was not in effect at the time the trailer park became operational during the time period from 1939 to 1941.

Ms. Donovan identified the City's Exhibit 10 as a Certificate of Occupancy issued by the City's zoning and building officer on March 7,

1955, certifying that the subject premises were then being legally operated under City ordinances then in effect. [App. 87, 146-149] The Certificate of Occupancy certified that the C-2 zoned portion of the "Trailer Court" was being operated as a legal use under the C-2 regulations in effect in 1955, and that the R-2 portion was being operated as a legal nonconforming use. [App. 87] The March 7, 1955 Certificate Occupancy was issued after the "RL Polk directory" was published in January of 1955, which Ms. Donovan testified gave information that the use of the premises previously had been changed to a mobile home park. [App. 139]

Ms. Donovan testified regarding the status of the Mobile Home Park as a nonconforming use. Ms. Donovan testified regarding the City's Exhibit 4 [App. 26, 135-137] Ms. Donovan identified Exhibit 4 as a copy of Division 4 of Chapter 134 of the City Zoning Ordinance providing regulations for nonconforming uses. [App. 135] Ms. Donovan testified that a nonconforming use under the regulations was as follows: "In general terms, if a property is zoned a particular zoning district which allows it rights for use under that zoning district classification and the property is subsequently rezoned to a different category that may exclude some use, uses that were previously legal under the original zoning prior to the rezoning would get to maintain their legal status, in other words, legal

nonconforming, until such time as they change or become unlawful, and then the use is supposed to convert to the allowed use in the zoning district, the new zoning district." [App. 135-136] With regard to nonconforming use rights in nonresidential districts, Ms. Donovan cited Section 134-1353(b) which specifically provides as follows: "If a lawful use of a structure or of a structure and land in combination exists at the effective date of the ordinance adopting or amending this chapter that would not be allowed in the district under the terms of this chapter, the use may be continued so long as it remains otherwise lawful." [App. 29, 137]

Ms. Donovan testified regarding a July 31, 2003 letter from City Deputy Zoning Enforcement Officer M. Joseph Bohlke to Richard L. Clark, a copy of which was admitted as Exhibit 21. [App. 176-177] Ms. Donovan testified that the letter was directed to the owner of the Mobile Home Park at the time the letter was written, Richard L. Clark. [App. 176] In his letter, the Zoning Enforcement officer acknowledged that "a Certificate of Occupancy (CO) was issued for the mobile home use." [App. 104] The letter continues by identifying all zoning violations then existing relating to the property, and none of the alleged violations relate to operation of a mobile home park. [App. 104]

Ms. Donovan testified that she did not "know what was there in 1955." [App. 193] Ms. Donovan testified that she had no evidence to show how the mobile home park was configured, or what the setbacks or separations were, at the time the Certificate of Occupancy was issued on March 7, 1955. [App. 147, 187-188] Ms. Donovan testified that "the City can't impose a larger setback on a legal nonconforming" use. [App. 191]

No 1955 aerial photo of the Mobile Home Park was offered into evidence by the City. Ms. Donovan testified regarding a 1963 aerial photo showing the Mobile Home Park, admitted as Exhibit 11. [App. 88, 149-152] The 1963 aerial photo was the best evidence the City had as to the configuration of the Mobile Home Park at the time the Certificate of Occupancy was issued on March 7, 1955.

Ms. Donovan testified also regarding a 2015 aerial photo showing the Mobile Home Park, admitted as Exhibit 3. [App. 132-135] Ms. Donovan compared the appearance of the Mobile Home Park in the 1963 aerial photo to the 2015 aerial photo. [App. 150-151] Ms. Donovan testified that the layout of the Park has not changed significantly from 1963 to 2015, that the driveway through the Park is in the same location, that there are roughly the same number of mobile homes, and that the mobile homes are in the same general locations. [App. 150-151] Ms. Donovan testified that the two aerial

photos show that the use of the premises as a mobile home park has not changed from 1963 to 2015. [App. 196] Ms. Donovan testified that the Park was configured in 1963 for approximately 33 to 39 mobile homes. [App. 196] Mr. Ogden later gave unchallenged testimony that the number of mobile homes currently in place in the Park is only 30. [App. 216-218]

Ms. Donovan testified that she first informed Mr. Ogden that she believed the Mobile Home Park to be in violation of City ordinances in a letter dated August 5, 2014, which letter was admitted as Exhibit 20. [App. 101, 166] During cross-examination, Ms. Donovan was asked whether the City had taken any actions "with respect to notifying the [Mobile Home Park] owner of any potential zoning violations during the period of time from 1955 to the present." [App. 198] Ms. Donovan responded that "[t]he first notification that I know of that was given to the owner regarding zoning violations was my [August 5, 2014] letter."

On cross-examination, Ms. Donovan was asked if there was anything in her file "to show that anybody raised any questions about this mobile home park?" [App. 198] Ms. Donovan responded: "Not until we were asked [by the city council] to do a review of the mobile home park for compliance issues." [App. 198]

On cross-examination, Ms. Donovan was asked under whose direction this legal action was brought. [App. 199] Ms. Donovan responded that "[t]he city council actually directed the action to review this, and eventually we're going to do all of them in the city and make sure they're in zoning compliance." [App. 199]

Mark Ogden testified in his own behalf. His testimony is set forth on pages 90 through 111 of the Transcript. [App. 203-224] Mr. Ogden testified that he was born in 1966, and that he has been a Des Moines resident all of his life. [App. 204-205] He testified that his uncle Richard L. Clark bought the Mobile Home Park in 1974, 1975 or 1976. [App. 205] As a child, Mr. Ogden mowed lots and did odd jobs at the Park for his uncle. [App. 206] Mr. Ogden testified that to his knowledge all of the mobile home pads are the same as the original pads at the site. [App. 206] He testified that the location of mobile homes on the site is substantially the same today as it was in 1976. [App. 206-207]

Mr. Ogden testified that he first became involved in management of the mobile home park in 1999. [App. 205-206] Mr. Ogden was asked to testify as to contacts he has had over the years with City zoning officials regarding the operation of the Mobile Home Park. [App. 207] He responded that he worked on some electrical inspection issues with City

inspectors in 1999. [App. 207-208] He testified that the issues were successfully resolved, and that the City inspectors made no mention of any possible zoning violations. [App. 211]

Mr. Ogden then testified that, in 2001, he had moved mobile homes to his site from a mobile home park owned by Norman Forget that had gone out of business. [App. 211-212] He testified that City zoning officials worked with him to make sure that the mobile homes were moved to his site in accordance with any applicable City requirements. [App. 212-214] He testified that the zoning officials he worked with at that time made no mention of any potential zoning issues. [App. 213-214]

Mr. Ogden testified regarding City Exhibit 21, which is a copy of a July 31, 2003 letter from M. Joseph Bohlke, who was then the City's Deputy Zoning Enforcement Officer, to Richard L. Clark, Mr. Ogden's now-deceased uncle who was then the owner of the mobile home park. [App. 104, 214-215] In the letter, Mr. Bohlke stated that "a Certificate of Occupancy (CO) was issued for the mobile home use, addressed as 3140 Indianola Avenue, on 3/7/55." [App. 104] Mr. Ogden testified that he was involved in the dealings with Mr. Bohlke that were the subject of the letter. [App. 215] Mr. Ogden testified that at no time in his dealings with Mr.

Bohlke did Mr. Bohlke raise the question of the legality of the mobile home park as a legal nonconforming use. [App. 215]

Mr. Ogden testified regarding Exhibit 6, containing photos of individual mobile homes in the Mobile Home Park. [App. 32, 215-218] In his testimony, Mr. Ogden identified 30 mobile homes that are still located in the Park. [App. 32-70, 215-218]

No evidence was presented at trial to show that the Mobile Home Park was in violation of any City fire safety codes or that any of the mobile homes in the Park were alleged to be a public nuisance. Mr. Ogden was asked to identify any situations where he was notified by City officials of code violations. [App. 207] Mr. Ogden responded by stated that the 1999, 2001 and 2003 matters mentioned above were the only three instances where he worked with City enforcement officials, and that in each such case City officials did not raise any code violations. [App. 207-215]

City Fire Marshal Jonathan Lund testified. [App. 120-126] Mr. Lund testified that there is no current action going on with respect to any code violations alleged by the Fire Department involving the Mobile Home Park. [App. 125-126]

In her testimony, SuAnn Donovan did not identify any fire safety code violations or any allegations that any particular mobile homes are public

nuisances. Ms. Donovan testified that it was her opinion that "overcrowding" has been a problem with the Mobile Home Park. [App. 151] Ms. Donovan testified that, for her, "the basic issue is the location of the mobile homes are too close together to meet either zoning requirements in '55 or today." [App. 151] However, Ms. Donovan conceded that "the City can't impose a larger setback on a legal nonconforming" use. [App. 191] Ms. Donovan was not able to identify any fire code violation that might be triggered by the "overcrowding" situation in the Park.

ARGUMENT

ISSUE 1

THE DISTRICT COURT'S RULING TO ENJOIN USE OF THE MOBILE HOME PARK IS IN VIOLATION OF THE U.S. AND IOWA CONSTITUTIONS, IOWA STATUTES AND CITY ORDINANCES.

A. Statement as to How the Issue was Preserved for Appellate Review.

The Appellant preserved the issue for appellate review by addressing the issue in its Answer, at trial, and in a timely filed notice of appeal.

B. Scope and Standard of Appellate Review.

The scope of review by the appellate court is de novo, because this appeal implicates constitutional principles. The appellate court is required to make an independent evaluation of the totality of the evidence. *Timberland Partners XXI, LLP v. Iowa Dept. of Revenue*, 757 N.W. 2d 172, 174 (Iowa 2008); *Simonson v. Iowa State Univ.*, 603 N.W.2d 557, 561 (Iowa 1999).

C. Argument

1. Introduction

This action concerns the vested legal rights of Mark Ogden and the resident-owners of all of the mobile homes within the Mobile Home Park to continue to use the premises as a mobile home park in the same manner as the premises continuously have been used since 1941. Current City zoning district regulations would not permit a new mobile home park on the premises. Since the use of the premises as a mobile home park was legal in 1955, before the prohibitive later zoning regulations became effective, the right to continue the use is based on the doctrine of "nonconforming use."

2. The Law of Nonconforming Use Rights

Nonconforming use rights developed to assure that property owners are not subject to unconstitutional takings of private property rights without due process and just compensation. Municipal restrictions may not deprive the owner of substantial use of property without due process. *See* U.S.

Const. Fifth Amend., section 1; Iowa Const. Art. I, section 18. Under the Fifth Amendment to the U.S. Constitution, private property may not be taken for public use, without just compensation. The "just compensation" clause is made applicable to the states by the Fourteenth Amendment. *Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418 (Iowa 1996).

A constitutional "taking" is not limited to appropriation of fee title to private property; the right to just compensation also may be triggered by a "taking" that deprives a property owner of the substantial use of his property. *Id.* at 431. For example, an owner could be making productive use of a parcel, prior to city enactment of a regulation that prohibits all productive use. The enactment of the new regulation would deprive the owner of use of his property, so as to entitle him to just compensation. "The term 'inverse condemnation' is a generic description of the manner in which a landowner recovers just compensation for a taking of the owner's property when condemnation proceedings have not been instituted." *Id*.

A city may avoid an inverse condemnation claim by providing for an administrative remedy. *See id*. One such administrative remedy can be afforded under an ordinance granting a property owner the vested right to continue a so-called "nonconforming use" that does not satisfy current zoning regulations.

"A nonconforming use is a use which not only does not conform to the general regulation or restriction governing a zoned area but which lawfully existed at the time that the regulation or restriction went into effect and has continued to exist without legal abandonment since that time." *Id.* at 430. "The prior use of the property essentially establishes a vested right to continue the use after the ordinance takes effect." *City of Okoboji v. Okoboji Barz, Inc*., 746 N.W.2d 56, 60 (Iowa 2008). An established nonconforming use runs with the land, and a change in ownership will not destroy the right to continue the use. *City of Clear Lake v. Kramer*, 789 N.W.2d 165 (Table), 2010 WL 3157759 (Iowa Ct. App. 2010).

3. The March 7, 1955 Certificate of Occupancy

In this case, the evidence shows that, sometime during the time period from 1939 to 1941, the premises were first used with pads for 39 mobile homes, in compliance with all City regulations then in effect. The City later adopted City Zoning Ordinance No. 5453 on July 9, 1953 [App. 72] The Ordinance contained certain setback and spacing regulations that were not in prior City regulations. The Mobile Home Park did not comply with some of those new regulations. To the extent it did not comply, it was legally permitted as a nonconforming use.

Part XX of Ordinance No. 5453 [App. 76] provides that no land or structures may be used without first obtaining a certificate of occupancy "stating that the building and use comply with the provisions of this ordinance and the building and health ordinances of the City of Des Moines." Part XX further provides that "[n]othing in this part shall prevent the continuance of a non-conforming use as hereinbefore authorized, unless a discontinuance is necessary for the safety of life or property."

In compliance with Ordinance No. 5453, a Certificate of Occupancy was issued by the City's zoning and building officer on March 7, 1955, certifying that the premises were then being legally operated under City ordinances then in effect. [App. 87] The Certificate of Occupancy certified that the C-2 zoned portion of the "trailer court" was being operated as a legal conforming use under the C-2 regulations in effect in 1955, and that the R-2 portion was being operated as a legal nonconforming use.

On July 31, 2003, M. Joseph Bohlke, the City's Deputy Zoning Enforcement Officer, delivered to the premises owner a written letter confirming that the March 7, 1955 Certificate of Occupancy was then in existence establishing the existing mobile home park as a legal nonconforming use under City zoning regulations. [App. 104]

The issuance of the Certificate of Occupancy by the City zoning officer established vested legal rights that could be relied upon by all future owners of the premises. The Iowa Supreme Court has dictated that a property owner acquires a legally vested right to a use certified to be legally permitted in a duly issued letter by the zoning enforcement officer. In *Crow v. Board of Adjustment of Iowa City*, 227 Iowa 324, 288 N.W. 145 (1939), a property owner complied with all applicable regulations in securing a permit for a building. The zoning officer reviewed the application and made an interpretation that the use for which the permit was sought was permitted by zoning regulations. The zoning officer also obtained an opinion from the city attorney that the use was permitted. The zoning officer then issued the permit. The property owner subsequently relied on the permit by purchasing building materials and commencing excavation and foundation work for the building. After such construction commenced, neighbors appealed the zoning officer's interpretation to the board of adjustment, and the board subsequently ruled that it disagreed with the zoning officer's interpretation, that the use was not permitted under the zoning ordinance, and that the permit should be cancelled. The Court held that, because the original decision by the zoning officer was based on an interpretation of the zoning ordinance that was not "clearly erroneous nor without basis," and because

"the proposition was doubtful and fairly debatable and the language fairly susceptible to the interpretation given it," the property owner acquired the vested right to proceed under the permit as issued.

As a matter of law, the issuance of the March 7, 1955 Certificate of Occupancy, together with the confirmation of the CO in the July 31, 2003 Bohlke letter, granted the vested perpetual legal right to continue to operate a mobile home park as a legal nonconforming use on the premises.

4. The Location and Number of Mobile Homes is Substantially the Same Today as in 1955.

SuAnn Donovan testified that the 2015 and 1963 aerial photos (App. 25 and 88) show that the layout of the Mobile Home Park is substantially the same today as it was in 1963, that the driveway is in the same location, and that the number and location of mobile homes is roughly the same. [App. 150-151] In fact, there are fewer mobile homes in the Park today than there were in 1963. There are only 30 mobile homes in the Park today. [App. 216-218] Ms. Donovan testified that the Park was configured in 1963 for approximately 33 to 39 mobile homes. [App. 196] The Mobile Home Park contains the same 39 mobile home pads as existed at the time the Park became operational during the period from 1939 to 1941. [App. 206]

Ms. Donovan testified that her concern is that some of the mobile homes shown in the 1963 aerial photograph were located closer together than the 12-foot setback distance requirement of the current Zoning Ordinance. [App. 151] Ms. Donovan testified that in 2015 the mobile homes have remained in the same locations as in 1963. [App. 151] Ms. Donovan testified that it was her opinion that the problem with the use of the Mobile Home Park has been "overcrowding. . . . *[T]he basic issue is the location of the mobile homes are too close together to meet either zoning requirements in '55 or today.*" [emphasis added] [App. 151] Ms. Donovan testified that she believed there were other violations of current City zoning regulations, but she presented no evidence that there had been any change since 1955 in the number or location of mobile homes that would have given rise to those alleged violations. [App. 168]

Vested nonconforming use rights cannot be revoked by a city merely because of insubstantial changes that do not change the primary use of the premises. An intensification of a nonconforming use is permissible so long as the nature and character of the use is unchanged and substantially the same facilities are used.

In *City of Central City v. Knowlton*, 265 N.W.2d 749 (Iowa 1978), the Iowa Supreme Court addressed the vested nonconforming use rights of a

junkyard. The court stated that "an intensification of a non-conforming use is permissible so long as the nature and character of the use is unchanged *and substantially the same facilities are used*." [emphasis in original] (citing from *Janigan v. Staley*, 245 Md. 130, 225 A.2d 277 (1967)). *Id*. at 754. The plaintiff city sought to terminate the nonconforming use rights, because the junkyard operator had "moved his junk business in whole or in part to a portion of his property which was not used for the junk business prior to the adoption of the ordinance." *Id*. at 752. The court held that the modification of use did not affect the vested nonconforming right to continue the nonconforming use, because the essential use of the premises was for a junkyard. *Id*., at 754. In support of its decision, the court cited a number of reported decisions from other jurisdictions. *Id*. These cited decisions involved court rulings upholding nonconforming use rights under factual situations where use of a junkyard was modified to increase the quantity and height of stored scrap metal and to increase the number of junk cars. *Id*.

In *City of Okoboji v. Okoboji Barz, Inc*., 830 N.W.2d 300 (Iowa 2013), the Iowa Supreme Court addressed vested nonconforming use rights relating to use of lakefront land as a marina predating a city zoning ordinance. The Court stated that an increase in the number of boats at the

marina was "a mere intensification of use . . . unlikely to be regarded as an impermissible extension. [citation omitted]." *Id*. at 304.

In *Jewell Junction v. Cunningham*, 439 N.W.2d 183, 186 (Iowa 1989), the Iowa Supreme Court stated that "[a] party who asserts a nonconforming use has the burden to establish the lawful and continued existence of the use, and once the preexisting use has been established by a preponderance of the evidence, the burden is on the city to prove a violation of the ordinance by exceeding the established nonconforming use. [citations omitted]." The Court determined that mere intensification of use is insufficient to result in loss of nonconforming use rights, and stated as follows:

> The key is that the present use must no be "substantially or entirely different" from the original use. In that respect, "not every change in particulars or details in the method of a nonconforming use or in equipment, object or processes, in connection therewith constitutes an unauthorized change in use." To illustrate, "a manufactory use relative to one product may be changed to the same use as to another product, and a storage use as to one commodity may be changed to such use as to another commodity." The question is whether the current use is different in kind in its effect upon the surrounding area. [citation omitted].

Id. at 186-87. The Court applied this test to a nonconforming nursing home and determined that the nursing home had not lost its nonconforming use rights merely because the residents' disabilities had changed from impaired mental functions due to the aging process to those caused by mental illness.

Id., at 187. The Court found it significant that: "There was no evidence of a material change in the structure itself, nor was there any substantial evidence of an adverse impact on the neighborhood. It was not shown that the present use increased traffic in the area or increased the demand for public services." *Id*.

In the present case, the evidence shows that the Mobile Home Park contains the same 39 mobile home pads as existed at the time the Park became operational during the period from 1939 to 1941. There has been no increase in the layout of the Park or the number of mobile homes during the 61 years since the 1955 Certificate of Occupancy was issued. If there had been any changes in the number of mobile homes or in their configuration on the premises, these changes would relate only to intensification of use, and would not rise to the level of a change in use that would deprive the Mobile Home Park of its long-established 61-year status as a vested legal nonconforming use.

5. The District Court Erred in Holding that the Use of the Mobile Home Park had Substantially Changed since 1955, so as to have Created a Fire Safety Public Nuisance.

In its Ruling, the District Court properly concluded "that the 1955 Certificate of Occupancy validly established a vested right in a

nonconforming use as a trailer court." [App. 280] However, the District Court erred in concluding "that a discontinuance of the nonconforming use under the 1955 Certificate of Occupancy is necessary for the safety of life or property." [App. 280] The Trial Court based this conclusion on its comparison of the 1963 and 2015 aerial photos, which the Court determined to reveal "a market increase in (1) the number of vehicles parked near the trailers and/or on the road; (2) the number of mobile homes with additional structures built on them; and (3) miscellaneous debris and out-structures such as sheds." [App. 271, 280]

All of the Trial Court's factual conclusions were drawn from examination of 1963 and 2015 aerial photos of the Mobile Home Park. Both of the photos were taken at a single precise moment in time. Neither of the photos was taken on the relevant date of March 7, 1955, when the Certificate of Occupancy was issued to establish the legal nonconforming use of the premises as a mobile home park. There is no evidence in the record to show the number and location of vehicles parked on the site, the actual number of mobile homes, the additions added to the main mobile home structures, or the debris and locations of out-buildings at the Mobile Home Park on March 7, 1955. The Trial Court made its determinative factual findings based on speculation.

The Trial Court's speculation did not have a reasonable foundation, because there was no other evidence in the record that showed there to be a current public safety issue. To the contrary, the evidence shows that there are no dangerous conditions in the Mobile Home Park, either now or at any time since the Park became operational in 1939, 1940 or 1941.

All of the Trial Court's public safety concerns relate to fire safety. [App. 281] However, no evidence was presented that the Mobile Home Park was being operated in an unsafe manner to expose its residents to danger from fires. City Fire Marshal Jonathan Lund testified that there have been no citations for fire safety code violations at the Park. City Zoning Officer SuAnn Donovan testified that there had never been a citation for a zoning violation at the Park until she issued an August 5, 2014 notice of violation. Ms. Donovan's August 5, 2014 violation notice was not issued because of any public safety concern. Ms. Donovan testified that her violation notice was in response to a general directive from the Des Moines City Council to review and enforce zoning regulations generally against all outstanding nonconforming uses. [App. 199]

Mark Ogden's vested right to operate his Mobile Home Park is a constitutionally protected nonconforming use. "The vested rights concept is a part of the balancing of the respective legitimate interests of the private

property owner against those of the general public, keeping in mind that the legitimate expenditures in connection with the use of an affected tract of land or in a business conducted on it, before the imposition of the regulation, may create a property right which cannot be arbitrarily interfered with or taken away without just compensation. [citations omitted]." *Kasparek v. Johnson County Bd. of Health*, 288 N.W.2d 511, 518 (Iowa 1980).

"A 'taking' of property need not involve wholesale appropriation of the land in fee simple; government action that substantially deprives a person of the use of property, in whole or in part, may be a compensable taking." *Easter Lake Estates, Inc. v. Polk County*, 444 N.W.2d 72, 75 (Iowa 1989).

"Only necessity justifies the exercise of police power to take private property without compensation." *Kasparek*, 288 N.W.2d at 518. The vested right of a property owner to continue a legal nonconforming use may be limited only to the extent necessary to abate a public or private nuisance. *Kasparek*, 288 N.W.2d at 519; *Easter Lake Estates, Inc*., 444 N.W.2d at 76.

In the present case, no evidence was presented to show that the Mobile Home Park was being operated as a public or private nuisance. There are 30 mobile homes in the Park. No evidence was presented to show that any of the mobile home owners had complained that their Park was a

nuisance. If there were nuisance conditions, the Park residents would have been the best witnesses to address the conditions. It is extremely telling that the City did not name any of the residents as party Defendants in this action and that the City did not call any Park residents to testify at trial.

Under the balancing test imposed by the Iowa Supreme Court in decisions such as *Kasparek* and *Easter Lake Estates*, the operation of the Mobile Home Park as a mobile home park is a vested use entitled to constitutional protection, and there is no evidence of any public or private nuisance on the premises that would justify a court ruling requiring that the use be enjoined and discontinued. The District Court erred in ruling to the contrary.

ISSUE 2

THE DISTRICT COURT ERRED IN ITS RULING BY NOT DECLARING THAT THE CITY WAS BARRED BY EQUITABLE ESTOPPEL FROM SEEKING TO ENJOIN THE USE OF THE MOBILE HOME PARK.

A. Statement as to How the Issue was Preserved for Appellate Review.

The Appellant preserved the issue for appellate review by addressing the issue in its Answer, at trial, and in a timely filed notice of appeal.

B. Scope and Standard of Appellate Review.

The scope of review by the appellate court is de novo, because this appeal implicates constitutional principles. The appellate court is required to make an independent evaluation of the totality of the evidence. *Timberland Partners XXI, LLP v. Iowa Dept. of Revenue*, 757 N.W. 2d 172, 174 (Iowa 2008); *Simonson v. Iowa State Univ*., 603 N.W.2d 557, 561 (Iowa 1999).

C. Argument

1. Equitable Estoppel Bars the City from Seeking to Enjoin the Use of the Mobile Home Park.

Even if the March 7, 1955 Certificate of Occupancy did not conclusively establish the vested right to continue the Mobile Home Park as a legal nonconforming use, the District Court erred in not ruling that the City was barred by equitable estoppel from obtaining an injunctive order to terminate the use 61 years after the 1955 Certificate of Occupancy. On pages 14 and 15 of its Ruling, the District Court determined that Ogden's equitable estoppel claim failed, because "there is no proof the City intentionally relinquished its right to enforce zoning ordinances against the property." [App. 282-283]

In exceptional circumstances, equitable estoppel is warranted against a governmental agency. *Bailiff v. Adams County Conference Board*, 650

N.W.2d 621, 626-27 (Iowa 2002). It is difficult to imagine more exceptional circumstances than exist in this case where the City has suddenly decided to repudiate a 1955 Certificate of Occupancy that is 61 years old. It is difficult to imagine how the City's 61-year acquiescence without citing any alleged violations was not clear proof of the City's intentional relinquishment of its right.

Equitable estoppel is warranted where a city makes representations to a defendant that are relied upon to the defendant's prejudice and injury. *City of Marshalltown v. Reyerson*, 535 N.W.2d 135, 137 (Iowa Ct. App. 1995). This case involves representations made over many years by City officials that the use of the premises as a mobile home park was legal and that there were no code violations.

The primary representation by the City was the issuance of the Certificate of Occupancy on March 7, 1955. In 2001, City zoning officials worked with the Mobile Home Park owner to assure that new mobile homes transferred to the Park from the Forget mobile home park were compliant with City regulations, and no mention was made by those City officials that there might be any zoning violations. In 2003, Zoning Officer Bohlke confirmed in his letter to the Mobile Home Park owner that the use as a mobile home park was a legal nonconforming use under the 1955 Certificate

of Occupancy. At no time during the entire 60-year period from March 7, 1955 until the present lawsuit was filed did a City official ever inform the Park owner that the City might consider the Mobile Home Park use to be illegal or in violation of any City public safety codes or other ordinances.

Equitable estoppel would be necessary in this case to avoid extreme prejudice to the Mobile Home Park owner, and also to the owners of each of the mobile homes in the Park. If the Park was closed, Mr. Ogden would be faced with a Park full of mobile homes abandoned by displaced owners who could not afford to move the homes to a new location. The costs to Mr. Ogden from removing all the mobile homes and improvements from the Park would be enormous.

But the costs to Mr. Ogden would be small relative to the extreme prejudice that would befall the resident-owners of all of the mobile homes. The Mobile Home Park is a residential neighborhood. If the Court was to grant the City the injunction it seeks, the result would be the destruction of the entire neighborhood.

2. The District Court Erred in Declaring the Testimony of Mobile Home Park Resident Gloria Jane Lang to be Irrelevant and Inadmissible.

One Park resident, Gloria Jane Lang, testified at trial, over the objections of counsel for the City. [App. 224-228] Ms. Lang is a 61-year-old lady who has lived in the Park for 37 years since 1979. [App. 226] She likes living in the Park, and she considers her quality of life to be good. [App. 224-228] She does not want to be forced to leave the Park. [App. 227] She does not have the money to pay to move her mobile home to another location. [App. 227] If the Park was closed and she was forced to move, her life would never be the same again. This is real prejudice involving a human life, and Ms. Lang is just one of many people in a neighborhood that would be uprooted in its entirety by closure of the Park.

In its Ruling, the Court declared that Ms. Lang's "testimony was irrelevant to zoning issues." [App. 270] This ruling was entirely unjustified. If the Park was closed and she was forced to move, her life would never be the same again. This is real prejudice involving a human life, and Ms. Lang is just one of many people in a neighborhood that would be uprooted in its entirety by closure of the Park.

By declaring that the testimony of a Park resident is irrelevant and inadmissible, the District Court has done a terrible injustice. The U.S. Constitution and the Iowa Constitution afford all citizens the right to equal protection under the law. This case is unique in the realm of constitutional

law, by virtue of the circumstances where the City's cause of action is to force people out of homes that they own—without affording them the right to be named a party to the action or to testify at the trial. There may not be a better example of an unconstitutional government action seeking to take a citizen's property without ANY due process of law whatsoever.

The Trial Court erred in excluding the testimony of Park resident Gloria Jane Lang. The appellate court should rule that Ms. Lang's testimony was relevant and admissible, and the appellate court should give due consideration to her testimony.

3. Gentrification—The True Basis for the City's Desire to Close the Mobile Home Park

The City Council of the City of Des Moines has an interest in promoting **gentrification** within the City. The City of Des Moines is just one of many cities nationwide that is trying to upgrade the appearance of the City and promote the most profitable use of land. "Dramatic changes are playing out across parts of urban America, making many neighborhoods hardly recognizable from a relatively short time ago. A new class of more affluent residents is moving into once underinvested and predominantly-poor communities. Development has followed, typically accompanied by sharp increases in housing prices that can displace a neighborhood's

longtime residents. It's a scenario known as **gentrification**, and one that presents a growing dilemma for policymakers." Article by Mike Maciag in Governing the States and Localities magazine, February 2015, available on-line at www.governing.com/mag/february-2016

"As wealthier inhabitants move into an area that is already populated with lower-income residents, the neighborhood begins to change as well. Often this will spark an urban renewal process, which cleans up the town, but often leads to an increase in rent, taxes, and other items. **Sometimes this change means that the previous residents can no longer afford to live in that neighborhood, which is why gentrification can sometimes be used in a negative context**." [emphasis added] From the definition of "gentrification" in BusinessDictionary.com, available on-line at www.businessdictionary.com

"Distinct differences emerge between neighborhoods that gentrified and those that haven't. Neighborhoods gentrifying since 2000 recorded population increases and became whiter, with the share of non-Hispanic white residents increasing an average of 4.3 percentage points." Article by Mike Maciag in Governing the States and Localities magazine, February 2015, available on-line at www.governing.com/mag/february-2016

The simplest strategy to promote gentrification is to do nothing and let the natural market forces influence underdeveloped properties to be redeveloped according to their most profitable highest and best uses. However, this natural process takes time, and the Des Moines City Council is impatient. The City Council has developed a strategy to identify nonconforming uses of underdeveloped properties and to file lawsuits against the owners alleging that the owners, for one reason or another, have lost their right to continue the nonconforming uses. If indeed the nonconforming uses have terminated as a matter of law, then the City is in a position to obtain a court ruling that the use must be discontinued and the property devoted to a use permitted under current zoning regulations.

In its Ruling, the Trial Court concluded, "[a]t best, Oak Hill is an eyesore." [App. 281] The Court should have stopped right there. The City Council's only interest is to get rid of an eyesore mobile home park—nothing more. There is nothing in the record to indicate that the City Council cares about what will happen to the residents who face eviction from homes that the City Council considers an eyesore. The City's asserted interest in protecting the safety of the residents is a subterfuge to mask the City's true gentrification purposes. There is nothing in the record to indicate that the City Council cares about the safety of the residents. If there were

any safety issues over the past 77 years, there would have been at least ONE safety code citation—but there have been none.

Under our federal and state Constitutions, every citizen is entitled to due process and equal protection under the law. The City's interest in promoting gentrification does not justify the taking of people's homes. The appellate court must not allow the City to use an asserted but unsubstantiated safety issue to justify the taking of 30 homes from the residents. The Mobile Home Park has existed for 61 years since the 1955 Occupancy Permit without any citation or any other action by the City to abate any asserted safety problem. Equitable estoppel compels the appellate court to reverse the District Court under the circumstances of this case.

CONCLUSION

The appellate court should Reverse the Ruling of the District Court and declare that the current use of the premises as a mobile home park is a legal nonconforming use and has been since the issuance of the Certificate of Occupancy on March 7, 1955, and that the City is barred from obtaining an injunctive order to terminate the use.

Alternatively, even if appellate court determines that the March 7, 1955 Certificate of Occupancy did not conclusively establish the vested right to continue the use of the premises as a mobile home park as a legal

nonconforming use, the appellate court should declare that the City is barred by equitable estoppel from obtaining an injunctive order to terminate the use 61 years after the issuance of the Certificate of Occupancy.

STATEMENT RE ORAL ARGUMENT

The Appellant respectfully requests to be heard at oral argument on this appeal.

Respectfully submitted,

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CERTIFICATE OF COSTS

I hereby certify that the cost of printing the foregoing Appellant's Proof Brief was $111.00 (exclusive of sales tax, postage and delivery).

/s/ James E. Nervig

NOTICE OF ELECTRONIC FILING

Notice of Electronic Filing is sent through the electronic document management system to the Clerk of the Iowa Supreme Court and to all registered filers for the within case.

/s/ James E. Nervig

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this Brief contains 7,892 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f), because the Brief has been prepared in a proportionally spaced typeface using Times New Roman font and utilizing the 2007 edition of Microsoft Word in 14 point font plain style.

/s/ James E. Nervig